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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1453

Neal R. Wooley, individually
and as Chief of Police, Lebanon,
New Hampshire; Paul A. Doyon,
individually and as Director of
the New Hampshire State Police;
Frederick Clarke, Jr., individually
and as Commissioner of the
New Hampshire Department of Motor Vehicles, Appellants

v.

George Maynard and
Maxine Maynard, Appellees

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The appellees, George Maynard and Maxine Maynard, ask leave to file the attached Motion to Affirm without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The appellees' affidavits in support of this Motion are attached hereto.

Respectfully submitted,

Richard S. Kohn, Esquire,
Jack B. Middleton, Esquire,
R. David DePuy, Esquire, and
McLane, Graf, Greene,
Raulerson & Middleton,
Professional Association

By R. David DePuy
Counsel for the Appellees

May 11, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

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Neal R. Wooley, individually
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Frederick Clark, Jr., individually
and as Commissioner of the
New Hampshire Department of Motor Vehicles, Appellants

v.

George Maynard and
Maxine Maynard, Appellees

A F F I D A V I T

I, George Maynard, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the appellees in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said cause.

5. The nature of said cause is briefly stated as follows:

My wife, Maxine Maynard and I sought declaratory and injunctive relief in the United States District Court for the District of New Hampshire pursuant to 42 U.S.C. §1983 requesting that NHRSA 263:1, which requires all New Hampshire noncommercial vehicles to bear number plates with the state motto, "Live Free or Die," written thereon, be declared unconstitutional on its face

and as applied to us, and that NHRSA 262:27-C be declared to be violative of the First and Fourteenth Amendments by making it a crime to obscure the state motto. By way of injunctive relief, we requested that the Court restrain the appellants from arresting or prosecuting us in the future for masking the state motto. A three judge federal court was convened and ruled that NH RSA 262:27-C was unconstitutional as applied to us in that it abridged our rights protected by the First and Fourteenth Amendments. The court enjoined the appellants from arresting either of us "at any time in the future for covering over that portion of [our] license plates that contains the motto 'Live Free or Die.'"

George Maynard

Duly witnessed and sworn to before me, a Notary Public this day of , 1976.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1453

Neal R. Wooley, individually and as Chief of Police, Lebanon New Hampshire; Paul A. Doyon, individually and as Director of the New Hampshire State Police; Frederick Clark, Jr., individually and as Commissioner of the New Hampshire Department of Motor Vehicles, Appellants

v.

George Maynard and Maxine Maynard, Appellees

A F F I D A V I T

I, Maxine Maynard, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the appellees in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

My husband, George Maynard and I sought declaratory and injunctive relief in the United States District Court for the District of New Hampshire pursuant to 42 U.S.C. §1983 requesting that NHRSA 263:1, which requires all New Hampshire noncommercial vehicles to bear number plates with the state motto, "Live Free or Die," written thereon, be declared unconstitutional on its face

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Maxine Maynard

Duly witnessed and sworn to before me, a Notary Public this day of , 1976.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 753-1453

NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire; PAUL A. DOYON, individually and as Director of the New Hampshire State Police; FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles,
APPELLANTS

v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

CERTIFICATE OF SERVICE

I, R. David DePuy, Esquire, depose and say that on May 11, 1976, copies of the "Motion For Leave to Proceed In Forma Pauperis" and accompanying unexecuted Affidavits of George Maynard and Maxine Maynard were mailed, postage prepaid to Robert V. Johnson, II, counsel for Appellants, State House Annex, Room 208, Concord, New Hampshire 03301, and Richard S. Kohn, Esquire, Suite 526, 733 15th St., N.W., Washington, D. C. 20005, co-counsel for the Appellees.

R. David DePuy

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

Subscribed and sworn to before me at Manchester this 11th day of May, 1976.

Robert A. Wells
Justice of the Peace

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1453

NEAL R. WOOLEY, individually and as
Chief of Police, Lebanon, New Hampshire;
PAUL A. DOYON, individually and as
Director of the New Hampshire State Police;
FREDERICK N. CLARKE, JR., individually
and as Commissioner of the New Hampshire
Department of Motor Vehicles,
APPELLANTS

v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

CERTIFICATE OF SERVICE

I, R. David DePuy, Esquire, depose and say that on May 11, 1976, copies of the "Motion to Affirm On Behalf Of Appellees George Maynard and Maxine Maynard" were mailed, postage prepaid, to Robert V. Johnson, II, counsel for the Appellants, State House Annex, Room 208, Concord, New Hampshire 03301, and Richard S. Kohn, Esquire, Suite 526, 733 15th Street, N.W., Washington, D. C. 20005, co-counsel for the Appellees.

R. David DePuy

STATE OF NEW HAMPSHIRE
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v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

MOTION TO AFFIRM ON BEHALF OF APPELLEES GEORGE MAYNARD and MAXINE MAYNARD

Richard S. Kohn, Esq.,

Jack B. Middleton, Esq.,

R. David DePuy, Esq., and

McLane,Graf,Greene,
Raulerson & Middleton,
Professional Association

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APPELLANTS

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GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

MOTION TO AFFIRM ON BEHALF OF APPELLEES GEORGE MAYNARD and MAXINE MAYNARD

The appellees, George and Maxine Maynard, pursuant to Rule 16 of this Court's Rules, hereby move that the Judgment below be affirmed on the grounds that the questions on which the decision of the cause depends are so insubstantial as not to need further argument and that the decision below is plainly correct.

OPINION BELOW

The opinion of the United States District Court for the District of New Hampshire was rendered on February 9, 1976 and is reported at 406 F. Supp. 1381. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The appellants have properly invoked the jurisdiction of this Court under 28 U.S.C. Sec. 1253, this being an appeal from an order granting, after notice and hearing, a permanent injunction in a civil action required to be heard and determined by a District Court of three judges.[1/]

QUESTIONS PRESENTED

I. Whether the doctrine of equitable restraint has any application to the action commenced by George Maynard where, at the time it was filed, there was no pending state prosecution, the relief sought was prospective only, and where no attempt was made to attack collaterally his state court convictions?

II. Whether the doctrine of equitable restraint has any application to the action commenced by Maxine Maynard, against whom no state court prosecutions had been brought but who was threatened with prosecution if she drove her car with the state motto taped over?

III. Whether the appellees can be criminally prosecuted for taping over the motto "Live Free or Die" on their license plates with reflective red tape to express their religiously based opposition to that sentiment?

STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, NHRSA 262:27-c and NHRSA 263:1, all of which are set forth in Appendix B.

STATEMENT

The appellees, George and Maxine Maynard, are Jehovah's Witnesses. At the time this suit was commenced, they owned two

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1/ It is clear that the appeal lies to this Court and not to the Court of Appeals where plaintiffs' complaint attacked the constitutionality of NHRSA 262:27-c "on its face and as applied" rather than the result obtained by the application of the statute. Turner v. Fouche, 396 U.S. 346, 353 n. 10 (1970).

automobiles. Since 1969, the State of New Hampshire has required that all number plates for non-commercial vehicles, with some exceptions, shall bear the State motto, "Live Free or Die." NHRSA 263:1. Under New Hampshire law, it is a misdemeanor knowingly to obscure the figures or letters on the license plates. NHRSA 262:27-c.[2/] Appellees believe that the message conveyed by the State motto is repugnant to their religious and political beliefs and refuse to display it on their automobiles.

Beginning in March or April, 1974, the appellees began covering the words "Live Free or Die" on their license plates with bright orange or red reflective tape. As a result, appellee George Maynard has three times been arrested, prosecuted and convicted for violating NHRSA 262:27-c. He has spent fifteen days in the House of Correction for his refusal to pay fines arising out of these convictions. As described by the district court in its opinion:

> "His first arrest took place on November 27, 1974. He appeared in Lebanon District Court pro se on December 6, 1974 at which time he explained that he had religious objections to displaying the motto on his license plate. The court found him guilty and fined him $25, but suspended the fine during good behavior. On December 28, 1974, Mr. Maynard was issued his second summons; and on January 31, 1975, he again appeared in court pro se. He was found guilty, fined $50, and sentenced to the Grafton County House of Corrections for six months. The court suspended the prison sentence. After trial, Maynard advised the court that he would have to refuse to pay the fines, which totalled $75, as a matter of religious conscience. The court then ordered him committed to the House of Corrections for a period of fifteen days. Prior to his incarceration, Mr. Maynard had on January 3, 1975 received his third summons for violating the statute. He was also found guilty by the court

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2/ The New Hampshire Supreme Court has held that "letters" includes the words of the State motto. State v. Hoskin, 112 N.H. 332, 295 A. 2d 454 (1972).

> of this offense on January 31, 1975, but sentencing was continued. At oral argument, counsel for the state defendants informed [the court] that, in this context, continued for sentencing is a final sentence under New Hampshire law. No collateral consequences will attach as a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at some time in the future." [3/] Maynard v. Wooley, 406 F. Supp. at 1384.

The present action was instituted by the appellees on March 4, 1975 to obtain a federal declaratory judgment that NHRSA 263:1 was unconstitutional on its face and as applied to them insofar as it required them to display the state motto on their license plates and that NHRSA 262:27-c violated the First and Fourteenth Amendments by making it a crime to obscure the state motto. Further, they sought injunctive relief, to operate in futuro, to prevent the appellants from arresting or prosecuting them for masking the state motto on their plates. They did not seek to have Mr. Maynard's prior convictions vacated or his arrest records expunged.

On March 11, 1975, the District Court issued a Temporary Restraining Order enjoining the appellants from making further arrests of the appellees pending a decision on the merits. An evidentiary hearing was held on September 22, 1975. On February 9, 1976, the court entered its opinion and order declaring NHRSA 262:27-c unconstitutional as applied to the appellees. The court granted a permanent injunction against the defendants preventing them from arresting or prosecuting the appellees for expressing their dissent from the state motto by taping it over.

3/ The court noted in a footnote that the time to appeal Mr. Maynard's prior convictions had expired before this action was brought. 406 F. Supp. 1384 n. 4 (1976).

ARGUMENT [4/]

THE OPINION OF THE THREE-JUDGE FEDERAL COURT WHICH IS THE SUBJECT OF THIS APPEAL IS OBVIOUSLY CORRECT SO AS TO WARRANT NO FURTHER REVIEW.

I. The doctrine of equitable restraint does not act as a bar to appellees' federal court action for declaratory and injunctive relief because it does not interfere in any way with the state criminal process and does not violate principles of comity, equity or federalism.

The policy of equitable restraint is rooted in the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if equitable relief is denied. Younger v. Harris, 401 U.S. 37, 43-44 (1971). The underlying premise is that ordinarily, a pending state prosecution "provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." Kugler v. Helfant, 421 U.S. 117, 124 (1975). These principles have no application here because appellees sought no relief against any ongoing state prosecution; in fact, there were no state prosecutions pending at the time appellees filed this suit. The sole purpose of the appellees' federal action was to obtain declaratory and injunctive relief to protect them from future arrests and prosecutions. The appellants conceded at the oral argument that more prosecutions would be forthcoming if the appellees persisted in their activity of taping over the state motto on their license plates. (Tr. p. 9) Under the circumstances, relief in the

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4/ Since the decision of the District Court can be sustained solely on the basis of reasons stated in its opinion, appellees in this motion do not brief additional grounds for the decision.

federal courts is appropriate. Steffel v. Thompson, 415 U.S. 452 (1974); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

Appellants rely on Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Kugler v. Helfant, 421 U.S. 117 (1975), for the proposition that appellees' failure to exhaust state appellate remedies precludes federal intervention. Those cases are easily distinguished. In Huffman v. Pursue, Ltd., supra, the federal plaintiff, acting on advice of counsel, made a deliberate decision to forego its state appellate remedies and seek injunctive relief in the federal courts against the state court judgment. If this maneuver had been permitted, the effect would have been to substitute the federal courts for the state appellate system. That is not the case here.

In each of his appearances in court, Mr. Maynard was not represented by an attorney and advised the court that he wished to represent himself. (Tr. 31, 44-45). After his first conviction on December 6, 1975, the fine imposed by the court was suspended during "good behavior." There was, therefore, no reason for an appeal. On January 31, 1975 when Mr. Maynard was convicted for his second and third offenses, he advised the court that he would not pay the accumulated fines as a matter of Christian conscience. The judge then sentenced him to fifteen days in jail. He served his sentence and was released on February 15, 1975. This record negates a calculated decision to forego appeal in the state courts and substitute the federal courts for the state appellate system. When appellees filed their action on March 4, 1975 not only were there no prosecutions pending

against Mr. Maynard but also the time for appealing his prior state convictions had expired. 5/

Kugler v. Helfant, supra, is similarly inapposite because there the federal plaintiff was the subject of state criminal proceedings and was trying to bring himself within the "extraordinary circumstances" exception to the Younger rule. While the appellees here have argued in the alternative that they fall within that exception, Kugler is not authority that would support appellants' exhaustion theory where there is no pending state prosecution. 6/

The appellants also rely on Cardillo v. Zyla, 486 F. 2d 473 (1st Cir. 1973) for the proposition that Mr. Maynard's federal action is an attempt to attack collaterally his state court convictions. As pointed out above, the federal action sought prospective relief only and would have no impact whatever on Mr. Maynard's prior convictions.

5/ Under New Hampshire's two-tier system of review, a defendant in a criminal case may appeal to the Superior Court for trial de novo at the time of sentencing in the District Court. RSA 599:1. If a defendant fails to take an appeal at that time, he may petition for an appeal within three days of the date sentence is declared. RSA 599:1-a. A person prevented from taking an appeal "through mistake, accident or misfortune and not from his own neglect" has 30 days after sentence is declared to petition the Superior Court for permission to appeal. RSA 599:1-b.

6/ Huffman, supra and Kugler, supra, would only be germane if, after being sentenced to the House of Correction on January 31, 1975, Maynard had filed a suit in federal court to enjoin the state court proceedings or execution of sentence.

II. The doctrine of equitable restraint has no application to the action brought by Maxine Maynard, against whom no state court proceedings had been brought but who was under a threat of prosecution.

In any event, it is clear that Mr. Maynard's failure to appeal from his criminal convictions could not act to bar Mrs. Maynard from obtaining a declaratory judgment and injunctive relief from the threat of prosecution. Despite some initial quibbling, the state, at oral argument, stipulated that both appellees were under the threat of prosecution. 7/ It was stipulated that Mrs. Maynard would testify that she shared her husband's religious beliefs and that she permitted to be obscured the words on the license plates on the car of which she is a co-owner. (Tr. 50-52) This is not a situation where "legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any of them." Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975). Mr. and Mrs. Maynard are individuals. If Mrs. Maynard were prosecuted and convicted of misuse of plates, she would go to jail in her own

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7/ Tr. pp. 8-9:

Mr. Johnson: The state will not stipulate there is any threat of prosecution to Mrs. Maynard, nor to Mr. Maynard, so long as he complies with the laws of this state.

Judge Gignoux: Will the State stipulate if they do not comply with the State there is a threat of prosecution?

Mr. Johnson: Yes, your honor.

Judge Gignoux: And, specifically, they do not comply with the statute here in question, which makes it unlawful, as I understand it, to obliterate "Live Free or Die" on those plates.

Mr. Johnson: Yes, your honor.

Judge Gignoux: There is a threat of prosecution of both.

Mr. Johnson: Yes, your honor.

Judge Coffin: All right, you may proceed.

See also Tr. pp. 51-52.

right. She cannot be precluded from obtaining a declaration as to the constitutionality of the statutes in question since she was clearly in jeopardy of being arrested for the same offense of which her husband had three times been convicted. Cf. Steffel v. Thompson, supra.

III. Appellees may not be criminally prosecuted for their act of taping over the words "Live Free or Die" on their license plates as an expression of their conscientious objection to the message conveyed thereby.

In determining whether the appellees' act in taping over the state motto on their license plates was symbolic speech, the District Court applied the principles set forth in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) and Spence v. Washington, 418 U.S. 405 (1974). This Court has said that conduct is a form of expression entitled to constitutional protection when it is "sufficiently imbued with elements of communication" so as to convey a "particularized message." Spence, 418 U.S. at 409, 411.

The court below found that these elements were satisfied by the fact that (1) in using red reflective tape to cover the motto the appellees clearly intended to call attention to the fact that they deliberately obscured it because they disagreed with it, and (2) appellees' message was likely to be readily understood by other New Hampshire citizens. The court then applied the four part test set forth in United States v. O'Brien, 391 U.S. 367 (1968) to determine whether the state's interest in displaying the motto on non-commercial license plates was sufficient to

restrict appellees' freedom of expression. The court found that the government regulation failed the third and fourth requirements set out in O'Brien in that the regulation was directly related to the suppression of free expression and that the motto was not required for purposes of identification, noting that other means were available to the state to preserve its interest in facilitating vehicle identification. Clearly, any state interests of pride and individualism are not denied by allowing appellees their right to free expression. If anything, they are furthered. As noted by the District Court, the state's claim that the motto "Live Free or Die" is needed to facilitate identification is belied by the fact that only passenger car license plates contain the motto. 406 F. Supp. 1388. Furthermore, the New Hampshire Director of Motor Vehicles testified that the taping of the motto on a license plate such as appellees' presents no identification problem. (Tr. 63)

Of 39 different types of New Hampshire plates, the motto "Live Free or Die" appears on only one type, the passenger car type. (Tr. 57-58) For a fee of five dollars a person may order a personalized license plate containing any combination letters and numbers not exceeding five, if not already assigned to someone else. (Tr. 67) Presumably the state could produce plates without the motto thereon for a five dollar fee within ten days. (Tr. 67)

In their Jurisdictional Statement, the appellants argue that Tinker and Spence are inapposite because the conduct engaged in there derived its communicative quality from the "then emotional Vietnam conflict." (J.S. p. 16) They stress

that in the case at bar, appellees' conduct is directed at an object having symbolic significance far less than that of the flag. They assert that the meaning of "Live Free or Die" is ambiguous and that a fortiori no "particularlized message" could be conveyed by covering it. Further, they suggest that the meaning of a symbolic act must be apparent at the time it is made and that the intended meaning cannot be explained by the testimony of the actor at his trial. (J.S. p. 18)

While the existence of a war may be significant in providing a backdrop for an act of symbolic speech, it goes primarily to the question of whether the message is likely to be understood, and not to whether the actor intended to convey a message. Here, where the state has required many of its citizens to display a politically loaded slogan on their private property, there can be no doubt that the act of covering that slogan over with bright red tape is designed to convey opposition to it. As George Maynard testified, the bright fluorescent red tape was effective in bringing attention to what they were doing. (Tr. pp. 16-17) Appellants contend that the phrase "Live Free or Die" is ambiguous and therefore no particularlized message could be conveyed by covering it. Yet the dominant message conveyed is that political freedom is the greatest good and that it is better to die than to live under tyrannical rule. Covering over this motto when it is required to be displayed is a clear statement that one disagrees with it. Appellants' suggestion that a symbolic act cannot be explained by testimony at trial is startling. Spence and Tinker directly contradict this.

Finally, the appellants are in error when they suggest that it is significant that appellees' conduct is directed at an object having less symbolic significance than the flag. It should be sufficient answer that Mary Beth Tinker's black armband had no intrinsic significance except as a symbol of mourning. Arguably, this has less symbolic significance than covering over an explicitly stated message that one must "Live Free or Die."

There is no doubt that in taping over the motto, the appellees intended to make a statement of their strong opposition to the credo, "Live Free or Die." It is equally clear that this message would be understood by other New Hampshire citizens seeing the appellees' license plates. Testimony at trial supported this. (Tr. pp. 16-17)

Unlike the situation in Spence v. Washington, supra, where Harold Spence was under no obligation to display the American flag, NHRSA 262:27-c compels the appellees to display a slogan they conscientiously oppose in order to operate their automobile on public highways.[8/] The only relief the appellees seek is the right to believe what they wish and to express those beliefs to others. To exercise

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8/ Thus it may be argued that to criminally prosecute the Maynards for taping over a slogan they find repugnant amounts to conditioning access to public highways upon the advertising of a prescribed sentiment which a state may not do, just as it may not condition attendance at school upon the saluting of the flag and reciting of the pledge of allegiance. Board of Education v. Barnette, 319 U.S. 624 (1943). The decision below indicates that Judge Bownes would find NHRSA 262:27-c violative of the appellees' right to be free from "compelled affirmations of belief." 406 F. Supp. at 1386 n. 9.

their rights and express their beliefs they must tape over the motto.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment and order of the District Court should be affirmed.

Respectfully submitted,

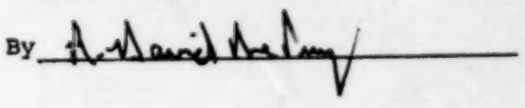
Richard S. Kohn, Esq.

Jack B. Middleton, Esq.

R. David DePuy, Esq., and

McLane, Graf, Greene,
Raulerson & Middleton,
Professional Association

Counsel for the Appellees,
George Maynard and
Maxine Maynard

By 

May 11, 1976

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

GEORGE MAYNARD and
MAXINE MAYNARD,

Plaintiffs,

v. Civil Action No. 75-57

NEAL R. WOOLEY, individually
and as Chief of Police,
Lebanon, New Hampshire,
et al.,

O P I N I O N

COFFIN, Chief Judge. This is an action instituted pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the enforcement of NHRSA 262:27-c, which makes it a crime to obscure the words "Live Free or Die" on New Hampshire state license plates. Plaintiffs, George and Maxine Maynard -- both Jehovah's Witnesses -- state that they have political and religious objections to operating a motor vehicle which displays this motto, and they contend that the enforcement of the New Hampshire statute against them is contrary to the First and Fourteenth Amendments of the United States Constitution. George Maynard has, on three occasions in the past, been arrested, prosecuted, and convicted for violating the statute in question. The plaintiffs seek a declaratory judgment that, as applied to them,

NHRSA 262-27-c is contrary to the United States Constitution, an injunction against any future arrests and prosecutions, and an injunction requiring that, in future years, they be issued plates that do not contain the motto "Live Free or Die". The single district judge granted plaintiffs' prayer for a temporary restraining order enjoining future arrests and prosecutions. Because the action seeks an injunction against the enforcement of a state statute on the grounds of its unconstitutionality, a three-judge court was convened pursuant to 28 U.S.C. § 2281.

Since 1969, NHRSA 263:1 has required that all number plates for non-commercial vehicles, with some exceptions, shall have the state motto "Live Free or Die" embossed on them.[1] NHRSA 262:27-c (Supp. 1973), makes it a misdemeanor knowingly to obscure the figures or letters on the license plates, and under New Hampshire law, the "letters" include the state motto. State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).[2]

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1. The New Hampshire state motto, which is reminiscent of the words of Patrick Henry -- "[B]ut as for me, give me liberty or give me death." -- derives from the words of Major General John Stark, reputed to have been written in 1809 as part of a toast in a letter to former comrades-at-arms: "Live free or die; death is not the worst of evils." Moore, A Life of General John Stark of New Hampshire 500 (1949). New Hamphire adopted "Live Free or Die" as its state motto in 1945, and in 1969, it passed a law requiring that, as of 1971, the motto must appear on most non-commercial plates.

2. In Hoskin, the New Hampshire Supreme Court held that NHRSA 262-27-c is not repugnant to either the due process clause or the First Amendment of the federal Constitution. In Hoskin, unlike the case at bar, the appellants did not contend that the act of covering the motto constituted symbolic speech that is protected by the First Amendment. Their First Amendment argument, which the New Hampshire Supreme Court rejected, was that the statute in question penalized them for exercising the right, recognized in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), to be free from a required affirmation of belief.

The plaintiffs own two automobiles. Beginning in March or April, 1974, they began covering the "Live Free or Die" on their license plates with tape -- usually reflective red tape. Beginning in late 1974 Mr. Maynard was arrested three times for violating NHRSA 262-27-c. His first arrest took place on November 27, 1974. He appeared in Lebanon District Court pro se on December 6, 1974 at which time he explained that had religious objections to displaying the motto on his license plate.[3] The court found him guilty and fined him $25, but suspended the fine during "good behavior". On December 28, 1974, Mr. Maynard was issued his second summons; and on January 31, 1975, he again appeared in court pro se. He was found guilty, fined $50, and sentenced to the Grafton County House of Corrections for six months. The court suspended the prison sentence. After trial, Maynard advised the court that he would have to refuse to pay the fines, which totalled $75, as a matter of religious conscience. The court then ordered him committed to the House of Corrections for a period of fifteen days. Prior to his incarceration, Mr. Maynard had on January 3, 1975 received his third summons for violating the statute. He was also found guilty by the court of this offense on January 31, 1975, but sentencing was continued. At oral argument, counsel for the state defendants informed us that, in this context, "continued for sentencing" is a final sentence under New Hampshire law. No collateral consequences will

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3. Mr. Maynard states that his religious objection to displaying the state motto is that "[b]y religious training and belief, [he] believe[s] that [his] government--'Jehovah's Kingdom'--offers everlasting life. It would be contrary to that belief to give up [his] life for the state, even if it meant living in bondage." He refuses to be coerced by the state to advertise a slogan which he finds morally, ethically, religiously, and politically abhorrent. Maxine Maynard testified that she shares her husband's views.

attach as a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at some time in the future.[4]

I. The Applicability of the Doctrine of Equitable Restraint

The state defendants contend that we are precluded from considering the constitutional merits of plaintiffs' claim by the doctrine of equitable restraint of Younger v. Harris, 401 U.S. 37 (1971). We disagree. Younger held that, in all but the most exceptional circumstances, a federal court should refuse to enjoin an ongoing criminal prosecution. Here, however, plaintiffs do not seek to enjoin a pending criminal prosecution. Their primary objective is to obtain declaratory and injunctive relief against future arrests and prosecutions. It is well established that where a federal plaintiff desires protection against threatened state prosecution of a constitutionally protected course of conduct in which he proposes to engage, a federal court can grant equitable relief. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (preliminary injunction); Steffel v. Thompson, 415 U.S. 452 (1974) (declaratory judgment). We believe that where, as here, the federal plaintiffs assert that enforcement of state laws against them would violate their First and Fourteenth Amendment rights and where, as here, state officials fully intend to enforce those laws, it is entirely appropriate that this court entertain plaintiffs' claim for injunctive relief.[5]

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4. The time for appeal from Mr. Maynard's convictions had expired before plaintiffs filed the present action on March 4, 1975.

5. The court finds, as the state defendants concede, that both plaintiffs are under a sufficient threat of prosection to present a justiciable controversy. See Steffel v. Thompson, supra at 459; Younger v. Harris, supra at 42.

Defendants do not dispute that the Younger doctrine permits federal injunctive relief against threatened arrests and prosecutions. Rather, they contend that Mr. Maynard is barred by his failure to appeal any of his three state convictions. For this proposition, they rely upon Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). There, the Court held that the federal plaintiff was barred because it had chosen not to avail itself of its state appellate remedies, but, instead, had instituted suit in the federal court to obtain relief from a state court judgment. See also Ellis v. Dyson, 421 U.S. 426, 439-43 (1975) (Powell, J., dissenting). Huffman, however, is readily distinguishable. Huffman, like Younger, was a case in which granting the requested injunctive relief would have interfered with the processes of the state court by nullifying prior or pending state court proceedings. Here, no such interference can result. Plaintiffs are not collaterally attacking Mr. Maynard's state court convictions.[6] The relief they seek is purely prospective. Therefore, neither Younger nor Huffman requires that we stay our hand; indeed, since plaintiffs have demonstrated that they will suffer irreparable harm if we do not intervene and have stated a substantial constitutional claim, it is our responsibility to hear the case. Cf. Zwickler v. Koota, 389 U.S. 241, 247-48 (1967).

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6. A more plausible position for defendants to take would be that Mr. Maynard's state convictions bar litigation of the federal constitutional issues. Although more plausible, this argument too fails. The first circuit has held that a state criminal conviction will have a preclusive effect in a federal civil rights action only with respect to matters actually litigated and decided at the state criminal trial. Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975). Since the constitutionality of the state statutes was not litigated by Mr. Maynard in the state misdeameanor proceedings, collateral estoppel principles do not preclude this court from considering this issue.

Even if the doctrine of equitable restraint barred Mr. Maynard's suit, we would still have to consider whether it bars Mrs. Maynard's action. She has an ownership interest in the Maynard family cars and, accordingly, is under a separate threat of prosecution. Cf. Steffel v. Thompson, supra at 459. This is not a situation "in which legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any of them", Doran v. Salem Inn, Inc., supra at 928. Doran suggested that such a situation might be presented where plaintiffs are brother-sister corporations related "in terms of ownership, control and management". Id. Here, however, each of the Maynards is acting on his or her own independently held religious precepts. There is no suggestion that either controls the actions or beliefs of the other. The relationship between these plaintiffs is thus much closer to that presented in Steffel v. Thompson, supra.[7] In our view, therefore, Mr. Maynard's failure to appeal his state convictions could not bar Mrs. Maynard's federal action for protection from future state criminal prosecution.

II. The Constitutional Merits

Plaintiffs' principal contention is that the New Hampshire statutes cannot be enforced against them consistent with the First Amendment of the federal Constitution, which, of course, is applicable to the states.[8] They maintain that their act of masking over the words "Live Free or Die" is constitutionally immune from state regulation because this act was done to avoid a required affirmation of belief, under the rule of West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); and because their act constituted symbolic speech, as to which New Hampshire cannot demonstrate a sufficient interest to regulate. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Since we accept plaintiffs' contention that their acts constituted constitutionally protected symbolic speech and that the state cannot prosecute them for masking the motto, we need not consider whether their First Amendment right to be free from a required affirmation of belief is implicated.[9]

We begin by identifying the public and private interests that are at stake. Although the act of covering the motto on a license plate may, in some cases, be an act of pure

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7. In Steffel, two persons engaging in antiwar handbilling outside a shopping center were threatened with state prosecution. One stopped, but the other continued and was arrested and charged with criminal trespass. While this state prosecution was pending, both filed a civil rights action in federal court seeking declaratory relief. The court held that while the one who had been arrested was barred by the Younger doctrine, the other remained free to present his federal claim. See Doran v. Salem Inn, Inc., supra at 928.

8. Plaintiffs also rely upon the due process and equal protection clauses of the Fourteenth Amendment. Because plaintiffs' First Amendment claim is dispositive, we do not address these alternate claims.

9. Judge Bownes would also rest our decision on the ground that NHRSA 262:27-c violates plaintiffs' right to be free from "compelled affirmations of belief".

whimsy, it is clear that plaintiffs' act of masking the motto with reflective red tape is motivated by deeply held, fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if the alternative is living in bondage. Plaintiffs' act of covering the "Live Free or Die" accomplishes two closely interrelated objectives: it relieves them of the burden of displaying a message which offends their beliefs, and, at the same time and more importantly, it communicates their strong disagreement with implications of the message. We have no doubt that plaintiffs' interest implicates the First Amendment. Whatever else may be said about the motto "Live Free of Die", it expresses philosphical and political ideas. Plaintiffs' desire not to be aligned with these ideas falls within the ambit of the First Amendment.[10]

The state interests promoted by the requirement that New Hampshire passenger cars display license plates bearing this motto are essentially twofold. First, the state believes that the dissemination of the motto and the association of it with New Hampshire serves a number of

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10. The defendants contend that the significance of "Live Free or Die" is primarily historical and that the motto is, in any event, so ambiguous that any First Amendment interest plaintiffs assert is de minimis. We do not deny the historical significance of New Hampshire's motto, but this significance is necessarily related to the philosophical and political ideas that have been so important in American history, see note 1 supra, but which plaintiffs are not compelled to endorse. Although the vast majority of, if not all other, state mottoes seem to lack ideological content, "Live Free or Die" has obvious political and philosophical significance for many. The New Hampshire motto may not be as politically charged as other slogans that might be placed on license plates, e.g., "Amnesty Now", but we can conceive of no neutral principle which would permit us to distinguish "Live Free or Die" from such others.

values: fostering appreciation of state history and tradition; creating state pride, identity, and individualism; and promoting tourism. Second, the presence of the motto on the plates aids in the identification of New Hampshire passenger cars. To permit individuals to mask the "Live Free or Die" on their plates would frustrate the attainment of these objectives. Whether these state interests are sufficient to justify the restriction on plaintiffs' activity will be considered below.

Plaintiffs' contention is that their act of masking the "Live Free or Die" on their license plates constitutes symbolic speech and that the New Hampshire defacement statute, NHRSA 262:27-c, is invalid as applied to them because it is not supported by any state interests that are sufficiently important to justify the restriction of protected expression. We agree.

This claim is based principally on two recent opinions of the United States Supreme Court invalidating state limitations on the exercise of "symbolic speech". In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court held it a violation of the First and Fourteenth Amendments for public school officials to discipline students for wearing black armbands to school in protest of United States involvement in Vietnam. In Spence v. Washington, 418 U.S. 405 (1974) (per curiam), the Court overturned appellant's conviction for "improper use" of an American flag where, in May, 1970, shortly after the invasion of Cambodia and the shootings at Kent State University, appellant had taped a peace symbol onto an American flag and hung it upside down from his window. See Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974). In each case, the Court concluded that the claimant's act was sufficiently imbued

with the elements of communication to be within the ambit of the First Amendment and that the state interests relied upon were insufficient to justify the restrictions on the protected expressions.

We are satisfied that plaintiffs' acts of covering the motto "Live Free or Die" constitutes symbolic speech within the meaning of Tinker and Spence. The use of reflective red tape to mask the motto is clearly intended to call attention to the fact that the motto has been obscured and thereby to communicate plaintiffs' disagreement with it. The context of plaintiffs' actions, which is important in determining their communicative quality, see Spence v. Washington, supra at 410, is such that plaintiffs' message is likely to be readily understood. New Hampshire citizens are well aware that the motto "Live Free or Die" appears on the license plates of passenger cars registered in that state, and the likelihood is great that they will interpret plaintiffs' obliteration of the motto as an expression of their conscientious objections to its implications.[11] Since plaintiffs' actions are intended as expression and readily perceived as such, we conclude that they are seeking to enjoin "a

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11. There is, moreover, evidence in the record that, at least since the decision of the New Hampshire Supreme Court in State v. Hoskin, supra, handed down in 1972, New Hampshire citizens have been generally aware that individuals like the plaintiffs have been covering the "Live Free or Die" on their license plates in order to express their opposition to the motto's implication that political freedom is the greatest good. This consideration supports our conclusion that the likelihood is great that observers will understand the significance of plaintiffs' acts.

prosecution for the expression of an idea through activity." Spence v. Washington, supra at 411.[12]

Having found symbolic speech, we now consider the sufficiency of New Hampshire's justifications for the statute. In United States v. O'Brien, 391 U.S. 367 (1968), upholding the respondent's conviction for knowing destruction of his draft card, the Supreme Court developed a four-part test for determining whether a government regulation restricting the freedom of expression protected by the First Amendment is justified. The Court stated, id. at 377:

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

We find that the defacement statute fails to meet two of the four components of the O'Brien test. The state has asserted that the statute serves two purposes: facilitating vehicle identification and promoting appreciation of history, state pride, individualism, and tourism. The effectuation of these objectives is within the constitutional power of the state and furthers

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12. Defendants contend that it will follow from our holding today that individuals will be free to cover up the mottoes on any state's license plate if they can conceive of some possible political or philosophical opposition to the motto. We reject this suggestion. Plaintiffs have succeeded in establishing that symbolic speech is involved in this case because they have shown not only that they intended to convey a message by their act but also that the message was likely to be understood. They were able to make this latter showing principally because the New

important and substantial governmental interests. These justifications, however, fail to satisfy the third and fourth requirements of the O'Brien test.

The defacement statute furthers the New Hampshire interest in promoting appreciation of history, state pride, and tourism by preventing individuals from covering over the motto and thereby ensuring the widest possible dissemination of the message contained therein. This interest is directly related to the suppression of free expression within the meaning of O'Brien. Although a government may perhaps single out certain messages for special protection when they appear on public property, see Spence v. Washington, supra at 408-09, Spence teaches that the governmental interest in preventing individuals from interfering with the communication of the state sponsored message by engaging in symbolic expression is not an interest that meets the third requirement of the O'Brien test. See Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1506-08 (1975). In Spence the Court indicated that the state interest in preventing interruption of the set of messages conveyed by the flag was directly related to the suppression of free expression. 418 U.S. at 412-14 & n. 8. The fact that plaintiffs' act, unlike that of the defendant in

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Hampshire motto itself possesses obvious political and philosophical significance. We doubt that symbolic speech could be shown in this type of a case when the motto has no such significance.

Spence, is the only practical alternative to displaying the motto indicates that the statute and the suppression of freedom of expression are even more closely related in the present case than in Spence.

Second, even if the statute's other objective -- requiring that "Live Free or Die" appear on all cars in order to facilitate identification of New Hampshire passenger vehicles -- might be considered unrelated to speech, this purpose clearly fails the fourth requirement of O'Brien: the defacement statute's effect on plaintiffs' First Amendment freedoms is certainly "greater than is essential to the furtherance of that interest". It cannot be seriously contended that the state of New Hampshire has, to use the words of O'Brien, supra at 381, no alternative means that would more precisely and narrowly assure preservation of its interest in facilitating vehicle identification. Surely it need not structure its system of vehicle identification so that individuals will have to display a motto to which they are philosophically opposed. That the presence of this motto on the license plates is required for identification is belied by the fact that only passenger cars are required to have license plates that contain the motto "Live Free or Die".[13]

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13. Defendants suggest that, whatever the merits of placing "Live Free or Die" on the license plates, for the present the motto is needed to distinguish plaintiffs' automobile from automobiles that have no motto on their plates but have the same identification number. However, the state defendants have not shown that any New Hampshire non-passenger motor vehicles have the same identification number as plaintiffs' and there is evidence in the record suggesting that none do. So, even assuming arguendo that this would be a sufficient justification, defendants have not satisfied their burden.

Since New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on plaintiffs' constitutionally protected expression,[14] we hold that as applied to plaintiffs NHRSA 262:27-c abridges the rights protected by the First and Fourteenth Amendments.

III. Relief

For the reasons stated above, defendants are enjoined from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto "Live Free or Die". Although there is evidence that New Hampshire could easily issue plaintiffs license plates that do not contain the motto -- the state presently manufactures vanity plates to order at a cost of $5 -- we decline to issue an injunction ordering the state officials to do so. The relief we have ordered should fully protect plaintiffs in the exercise of their First Amendment rights, and we would be ill-advised to interfere further with the operation of New Hampshire's system of vehicle identification.

So ordered.

Frank M. Coffin
U. S. Circuit Judge

U. S. District Judge

U. S. District Judge

Dated at Concord, New Hampshire

on February 9, 1976

cc: Robert V. Johnson II, Esq.
Richard Kohn, Esq.
Peter Decato, Esq.

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14. The fact that defendants have not satisfied the O'Brien test is not necessarily dispositive of the statute's invalidity. See Spence v. Washington, supra at 414 n. 8; Ely, supra at 1496-97. It is implicit in the foregoing discussion, however, that neither of the interests New Hampshire has identified is sufficiently weighty to justify the interference with plaintiffs' protected expression.

Defendants also argue that the New Hampshire defacement statute effects such minimal interference with the values protected by the First Amendment that the state's otherwise insufficient justifications should be deemed sufficient for this case. The core of defendants' submission is that plaintiffs have equally effective alternative means of conveying their message: they could place bumper stickers near the plates which express their disagreement with the motto. We reject this argument. Spence v. Washington, supra, summarily rejected the contention that the free expression claim should fail since it was "miniscule and trifling" in view of the thousands of other available means of disseminating the views. One may not have his liberty of expression in an appropriate place abridged on the ground that the message could be conveyed in an alternative way. 418 U.S. at 411 n. 4. See Cohen v. California, 403 U.S. 15 (1971); Schneider v. State, 308 U.S. 147, 163 (1939).

APPENDIX B

U. S. Const. Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition to government for a redress of grievances."

U. S. Const. Amend. XIV, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Hampshire RSA 263:1 "Number Plates"

> "Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto "live free or die" written thereon. The plates shall be kept clean."

New Hampshire RSA 262:27-c "Misuse of Plates"

> "Any person who knowingly attaches or permits to be attached to a motor vehicle a number plate assigned by the director or authority of any other jurisdiction, to another vehicle or who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle or who knowingly and deliberately fails to display on a motor vehicle proper lights, as herein provided, or the number plates and the registration number duly issued therefor shall be guilty of a misdemeanor."